IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-689

INDIANA & MICHIGAN ELECTRIC COMPANY,

Petitioner,

v.

CITY OF MISHAWAKA, INDIANA, *et al.*,

Respondents.

BRIEF *AMICUS CURIAE* OF CITY OF BATAVIA, CITY OF GENEVA, CITY OF NAPERVILLE, CITY OF ROCK FALLS, AND CITY OF ST. CHARLES, ILLINOIS IN OPPOSITION

CHARLES F. WHEATLEY, JR.
FRANK W. FRISK, JR.
WHEATLEY & MILLER
1112 Watergate Office Building
2600 Virginia Avenue, N. W.
Washington, D.C. 20037

MARVIN G. GLINK
ANCEL, GLINK, DIAMOND
& MURPHY, P.C.
111 S. Washington Street
Chicago, Illinois 60602

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Cities of Batavia, Geneva, Naperville, Rock Falls, and St. Charles, Illinois are municipalities of the State of Illinois, (hereinafter referred to as "Illinois Municipals") which own and operate electric distribution systems serving the inhabitants of their communities. The Illinois Municipals purchase all their electric power

requirements at wholesale from the Commonwealth Edison Company, which completely surrounds them and controls all transmission in the area. Since 1970, the Illinois Municipals have asserted to the Federal Power Commission[1] that the Commonwealth Edison Company has discriminated against the Illinois Municipals under Section 205(b) of the Federal Power Act by unilaterally filing and putting into effect wholesale rate increases in excess of the prices at which the Company sells similar quantities of power to its large industrial customers. These matters are still pending before the Federal Power Commission.[2] The Illinois Municipals in 1976 filed a complaint in Federal District Court against Edison, alleging violation of the federal antitrust laws (§§1 and 2 of the Sherman Act and §2(a) of the Clayton Act) based, *inter alia*, upon the unilateral activities of Edison in imposing an anticompetitive price

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[1] On October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act, Public Law 95-91, 91 Stat. 565 (August 4, 1977) and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 13, 1977), the Federal Power Commission ceased to exist and its functions and regulatory responsibilities were transferred to the Secretary of Energy and the Federal Energy Regulatory Commission which, as an independent commission within the Department of Energy, was activated on October 1, 1977. For purposes of convenience, the designation "FPC" is used herein whenever it is intended to refer to either the Federal Power Commission or the Federal Energy Regulatory Commission.

[2] In *Cities of Batavia v. FPC*, 584 F.2d 1056 (D.C. Cir. 1977), the court vacated an FPC order which had overturned an initial decision of a Presiding Administrative Law Judge finding Edison's action to have been unduly discriminatory in violation of §205(b) of the Federal Power Act. That remand as well as similar proceedings involving a subsequent unilateral wholesale rate filing by Edison in 1974 which increased the wholesale rates even higher vis-a-vis the Company's large industrial rates are now pending before the Commission.

squeeze upon the Illinois Municipals which threatens their very existence. The Illinois Municipals in the antitrust proceedings do not seek any relief or remedy conflicting in any way with the Commission's jurisdiction under §205(b) of the Federal Power Act, as construed by this Court's decision in *Conway, infra,* but seek to enforce their rights under the long-standing federal antitrust laws for an injunction or damages against Edison's continued anticompetitive activities. After Edison obtained a stay of the antitrust proceedings from the district court pending the outcome of the appeal by the present petitioner, Indiana and Michigan Electric Company, to the United States Court of Appeals for the Seventh Circuit, the Illinois Municipals filed a brief as *amicus curiae* before the court.[3] Since it is their understanding that Commonwealth Edison Company plans to file a brief with this Court as *amicus curiae* in support of Indiana & Michigan Electric Company's petition for a writ of certiorari, the Illinois Municipals herein file as *amicus curiae* in opposition to granting the writ.

The Illinois Municipals have received the consent of counsel for all parties to file this brief *amicus curiae,* in accordance with Rule 42 of this Court.

REASONS FOR DENYING THE WRIT

The decision of the court of appeals below affirming the decision of the District Judge upholding the jurisdiction of the district court to consider asserted violations of the federal antitrust laws based on the

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[3] The participation of the Illinois Municipals in the proceedin s below was recognized by the Court in its opinion (Pet. App. 28a-30a).

unilateral imposition of a price squeeze by an electric utility company upon its wholesale customers, is clearly correct and need not be reviewed at this time. The petitioner's projection of a conflict between the long-standing jurisdiction of the district courts to enforce the antitrust laws, and the different jurisdiction discussed in *Conway*[4] under §205(b) of the Federal Power Act to consider discrimination, is hypothetical — when and if any conflict between an antitrust decree and a final Commission decision under *Conway* should develop, that will be the proper time for its consideration by this Court. Petitioner's attempt to subvert this Court's *Conway* decision into a shield of immunity from any liability under the federal antitrust laws needs no review at the present time for the following reasons: (1) this Court has consistently held in a number of decisions that the Federal Power Act does not supersede the federal antitrust laws or immunize utilities from compliance with those laws; (2) the precedents based on other statutes urged by petitioner for an implied repeal of the Federal antitrust laws are inapplicable; (3) the efforts of petitioner to seek antitrust immunity based on its filings with state commissions are misplaced; (4) the separate antitrust relief available is in the public interest; and (5) the court below properly denied a stay of the antitrust proceedings.

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[4] *Federal Power Commission* v. *Conway Corp.*, 427 U.S. 271 (1976).

I.

THE FEDERAL POWER ACT DOES NOT SUPERSEDE THE FEDERAL ANTITRUST LAWS.

This Court has never waivered in finding that the Federal Power Act does not set forth a pervasive scheme of regulation from which a jurisdictional electric utility could claim an implied immunity from the antitrust laws, or that there is a basis for exclusive or primary jurisdiction under the Federal Power Act which would require a district court to defer to the Federal Power Commission any matter which may be the subject of proceedings in both forums.

In *Otter Tail Power Co. v. United States,* 410 U.S. 366 (1973) this Court specifically held that the Act was not a substitute for or offered immunization from the antitrust laws:

> *It is clear, then, that Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships.* When these relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws. See United States v. Radio Corporation of American, supra, at 351, 79 S. Ct. 457, 467. This is particularly true in this instance because Congress, in passing the Public Utility Holding Company Act, which included Part II of the Federal Power Act, was concerned with "restraint of free and independent competition" among public utility holding companies.

> Thus, there is no basis for concluding that the limited authority of the Federal Power Commission to order interconnections was intended to be a substitute for or immunize Otter Tail from antitrust regulation for refusing to deal with municipal corporations. 410 U.S. at 374, 375 (Emphasis added.)

With respect to the Otter Tail's refusal to deal, there is an express provision of the Federal Power Act, §202(b), 16 U.S.C. 824a(b), to provide wholesale service when necessary "in the public interest." The Court noted that the factors which would compel a §202(b) interconnection under the Act were based upon a decision as to whether the action was "necessary or appropriate in the public interest," and that this decision was wholly unrelated to antitrust considerations. 410 U.S. at 373.

Similarly, Sections 205(a) and 206(a) of the Federal Power Act, 16 U.S.C. 824d, 824e, endow the Commission with the jurisdiction to establish rates and charges, that are "just and reasonable," (a standard similar to the "necessary and appropriate standard" of §202(b)). Whereas the Commission's decision to compel (or not to compel) interconnection pursuant to Section 202(b) of the Act is to be based upon a decision as to whether the action is "necessary or appropriate in the public interest," and rates, in order to be adjudicated lawful by the FPC must be found to be "just and reasonable" pursuant to Sections 205(a) or 206(a) of the Act, the two situations are parallel since the Commission's decision in both instances is not governed by antitrust considerations. As the Court pointed out: "[a]lthough antitrust considerations *may* be relevant, they are *not* determinative." 410 U.S. at 373 (Emphasis added.)

In a decision subsequent to *Otter Tail,* this Court considered the reciprocal situation of the responsibility of the FPC in administering the Federal Power Act to consider the principles of the antitrust laws. *Gulf States Utilities Co. v. FPC,* 411 U.S. 747 (1973), held that the FPC must consider the potential anticompetitive consequences of a jurisdictional utility's proposed securities issue under §204, 16 U.S.C. 824c, of the Federal Power Act, making it quite clear that such a responsibility could in no sense be deemed to supersede or grant immunity from liability under the antitrust laws:

> Consideration of antitrust and anticompetitive issues by the Commission, moreover, *serves the important function of establishing a first line of defense against those competitive practices that might later be the subject of antitrust proceedings.* This is particularly significant in the context of a security issue under §204, for appropriate consideration at a preissue stage may avoid the need later to unravel complex transactions in granting relief under the antitrust laws or other sections of the Federal Power Act. 411 U.S. at 760 (Emphasis added). See also *City of Huntingburg v. FPC,* 498 F.2d 778 1783 (D.C. Cir. 1974).

In *California v. Federal Power Commission,* 369 U.S. 482 (1962), the FPC, pursuant to its authority under Section 7(c) of the Natural Gas Act, 15 U.S.C. 717f[5]

[5]Since the Natural Gas Act "grew out of the same judicial history as did" Part II of the Federal Power Act, the Commission is endowed with basically the same powers in the electric utility industry as it is in the natural gas industry. In interpreting the reach of similar statutory provisions, the case law relating to the Power Act and the Gas Act are considered interchangeable. *Federal Power Commission* v. *Southern California Edison Co.,* 376 U.S. 204, 211 (1964), *FPC* v. *Sierra Pacific Power Co.,* 350 U.S. 348 (1956).

considered and approved a merger by stock acquisition, although an antitrust case filed by the Department of Justice was pending before a district court. This Court held that the Natural Gas Act did not supersede the federal antitrust laws, and a decision by the Commission could not immunize a party from antitrust actions in a district court:

> Here, as in United States v. Radio Corp. of America, 358 U.S. 334, 3 L.Ed 2d 354, 79 S.Ct. 457, while "antitrust considerations" are relevant to the issue of "public interest, convenience and necessity" (id. 358 U.S. at 351), there is no "pervasive regulatory scheme" (ibid.) including the antitrust laws that has been entrusted to the Commission. 369 U.S. at 485.
>
> This Court stated that its function "is to see that the policy entrusted to the courts is not frustrated by an administrative agency, . . . lest the antitrust policy whose enforcement Congress in this situation has entrusted to the courts is in practical effect taken over by the Federal Power Commission." 369 U.S. at 490; see also *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964).

Thus, on the basis of *Otter Tail, Gulf States,* and *California v. Federal Power Commission,* the court of appeals in this case was correct in concluding that the Commission does not have exclusive jurisdiction over price squeezes: "Since the antitrust laws are not generically superseded by the regulation of electric Utilities . . ." (Pet. App. 19a).

It is quite clear that this Court in its *Conway*[6] decision did not intend to overrule or change *sub*

[6] *Federal Power Commission* v. *Conway Corp.*, 426 U.S. 271 (1976).

silentio its long line of cases affirming no supersedure of the federal antitrust laws by the Federal Power Act. This Court's decision in *Conway* which set the remedial limits for discrimination under §205(b) of the Federal Power Act within a "zone of reasonableness" shows clearly that there is no plain repugnancy between the Federal Power Act and the antitrust laws. Discrimination can result from filings made by electric utilities before both the FPC and state commissions. In *Conway* it was properly noted that the Commission's jurisdiction is limited to wholesale rates. Although the FPC may look at retail rates in evaluating price squeezes, its power to remedy them is restricted to an adjustment of the wholesale rate. Thus, any antitrust violation based upon a price squeeze is clearly outside the remedial scope of the Federal Power Act, as this Court demonstrated in *Conway*, and there can be no repugnacy between the Act and the antitrust laws.

In the *Shakopee* case, *City of Shakopee v. Northern States Power Co.*, Civil No. 4-75-59-591 (D. Minn., October 19, 1976), cited by the court of appeals, Judge Lord similarly held that there is no repugnancy between the antitrust laws and regulation of electric utilities when price squeeze violations are at issue:

> As in *Shakopee*, the price squeeze alleged in our case 'is not between rates set by one regulatory agency as was the case in *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, but rather is between the 'wholesale' rate set by FPC and the 'retail' rate over which the FPC has no jurisdiction. Put simply, under these circumstances, antitrust immunity is not 'necessary' to the functioning of the regulatory process because the discrimination is 'external' to that process. The FPC does not control both ends of the discriminatory conduct.' (Pet. App. 20a).

Also cited by the court of appeals was a Federal Power Commission order issued on May 23, 1977 in *Northern States Power Company*, FPC Docket No. ER76-818, in which the Commission held that it did not have exclusive jurisdiction over price squeeze matters, concluding that "there is no alternative to this issue being litigated in both forums, one concerning itself with present rates and the other with past rates and possible future conduct." (Pet. App. 21a) The Commission went on to hold that should a price squeeze plaintiff "prove itself entitled to relief the regulatory process would not be disturbed by an award of damages for past conduct nor by an enjoining of certain future conduct." *Id.*

The court of appeals noted that petitioner was fully aware of the fact that the Commission has limited remedial power over price squeezes (Pet. App. 25a). In its petition to this Court petitioner again concedes that FPC cannot provide a complete price squeeze remedy: "The Court of Appeals decision below rests heavily upon FPC's inability *fully* to alleviate a price squeeze between the wholesale and retail price structures, irrespective of the zone of reasonableness for wholesale rates." (Pet. 19). However, the court of appeals did not, as petitioner suggests (Pet. 13), hold that the remedial limitations of the Act as set forth by this Court in *Conway* would be exceeded, and it stated this clearly and unequivocally:

> Nor does *Conway* guarantee that the price squeeze may be fully remedied by severely depressing wholesale rates to eliminate the price squeeze. This is because, as we have demonstrated above, the Federal Power Commission cannot set wholesale rates below the lower boundary of the zone of reasonableness even if the price squeeze could not be eliminated without setting the wholesale price below the zone of reasonableness (Pet. App. 25a, 26a).

Petitioner's concern that the court of appeals decision would lead to confiscatory wholesale rates beyond the limitation set in *Conway* is simply not well-founded. In any event, it is premature to speculate what the effect of a district court remedy would be if it found that there was a price squeeze. There is no present conflict, or even the possibility of such a conflict, so there can be no "present concrete case or controversy concerning it."[7]

This Court in *Otter Tail* stated the well-established rule of construction applied to cases where implied immunity is at issue:

> "Repeal of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." (Citations omitted) 410 U.S. at 372.

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[7] *Otter Tail, supra*, 410 U.S. at 377. In *Otter Tail* this Court stated that: "The decree of the District Court has an open end by which that court retains jurisdiction 'necessary or appropriate' to carry out the decree or for 'future modification of any of the provisions.' It also contemplates that future disputes over interconnections and the terms and conditions governing those interconnections will be subject to Federal Power Commission perusal. It will be time enough to consider whether the antitrust remedy may override the power of the Commission under Section 202(b) as, if, and when the Commission denies the interconnection and the District Court nevertheless undertakes to direct it." 410 U.S. at 376, 377. Unlike the *Otter Tail* situation, no district court has determined that a price squeeze exists in this case, so the question of any remedy is even more remote.

In holding that there is no plain repugnancy between the antitrust laws and Section 202(b) of the Federal Power Act, this Court noted that the Commission had been given only partial authority to order interconnections, instead of full authority to order wheeling of power over transmission lines. The same situation arises in this case. Under the rate filing and approval sections of the Act the Commission has been given only partial authority to remedy a price squeeze, instead of the full authority which could have been vested in it by Congress.

Petitioners have not set forth any reasons why this case is any different from *Otter Tail,* or demonstrated that there is a plain repugnancy between the Federal Power Act and the antitrust laws which would call into play an implied immunity, a finding that is strongly disfavored.

II.

THERE IS NO IMPLIED REPEAL OF THE FEDERAL ANTITRUST LAWS BASED ON OTHER PRECEDENTS.

Rather than setting forth any reason why this Court should abandon its well-established holdings that the Federal Power Act does not set forth a pervasive scheme of regulation from which an implied immunity from antitrust laws can be derived, petitioner argues that that principles of implied repeal in *Silver v. New York Stock Exchange,* 373 U.S. 341 (1963), *Gordon v. New York Stock Exchange,* 422 U.S. 659 (1975), and *United States v. National Association of Securities Dealers, Inc.,* 422 U.S. 694 (1975) should apply to this case (Pet. 16-20). Illinois Municipals submit that these arguments are not supportive of a grant of certiorari for several reasons.

Petitioner states that a Petition for Writ of Certiorari pending before this Court in *American Telephone & Telegraph Co. v. United States,* Docket No. 77-372, "raises similar issues arising under different procedural circumstances." (Pet. 16 n. 12). This Court denied the AT&T petition on November 28, 1977. Petitioner is attempting to apply law developed under other statutory provisions unrelated to the Federal Power Act. The proper approach to an implied immunity issue was stated by the district court in the AT&T case:

> When faced with implied immunity questions, the courts have undertaken a case-by-case approach which analyzes the particular industry, the applicable regulatory scheme and procedures, and the statutory history to determine whether operation of the antitrust laws can be reconciled with the regulatory scheme. United States v. American Telephone & Telegraph Co. et al. Civ. No. 74-1698 (D.D.C., November 24, 1976).

This Court has followed this approach in *Otter Tail, Gulf States,* and *California v. Federal Power Commission.* It is not necessary to undertake the task again.

The trilogy of cases relied upon by petitioner has no relevance to reconciliation of regulation and antitrust law coverage in the electric industry. *Silver, Gordon,* and *National Association of Securities Dealers* were all decisions concerning the question of implied immunity under statutes administered by the Securities and Exchange Commission. In *Silver* this Court, holding that the Exchange Act did not provide an implied repeal of the antitrust laws, left the door open whereby a "different case" would arise if there had been SEC jurisdiction and judicial review of a "particular exchange ruling, as there is under the 1938 Maloney

Act amendments to the Exchange Act to examine disciplinary action by a registered securities association." 373 U.S. at 358 n. 12. In contrast, this Court has never left the door open for a "different case" to arise under the Federal Power Act. Petitioner is attempting to fit the round peg of SEC regulation into the square hole of FPC regulation. In light of the consistent holdings by this Court that there is no implied immunity under the Federal Power Act, it just will not fit. The court of appeals, as will be explained below, was correct when it stated:

> In order to imply a general exemption for an economic sector of an industry, mere conflicting standards are not enough. This aspect of a regulatory agency's jurisdiction must be "imperative in the continuing effective functioning" of the regulatory scheme over the industry as a whole. *Cantor, supra,* at 596-597 n. 36 and n. 37. Since Cantor distinguished and refused to apply *Gordon v. New York Stock Exchange,* 422 U.S. 659, perhaps defendant's principal case on this ground, no purpose would be served in discussing it further here. See 428 U.S. at 596-597 n. 36. (Pet. App. 19a n. 8)

Gordon has no application to the case at bar. This Court reconciled the operation of the antitrust laws with the regulatory scheme set forth in Section 19(b) (15 U.S.C. 78s(b)) of the Securities and Exchange Act of 1934, which is not comparable to any Federal Power Act provision. Section 19(b) vests the SEC with specific review power over the fixing of commission rates, and this Court noted that the SEC had exercised its supervisory power since 1958 by conducting detailed studies, and regulating this area very stringently. 422 U.S. at 668-77. For a rate to become effective under

the Securities Act, the SEC must approve it first under Section 19(b). In stark contrast to this procedure is Section 205 of the Federal Power Act. (16 U.S.C. 824d.) A rate filed with the FPC becomes effective within five months, whether it has been approved by FPC or not, regardless of whether or not it meets the "just and reasonable" standards of the Act. The scheme set forth in Section 205 leaves the FPC without power to prevent the rate from becoming effective, and is clearly not analogous to the situation in *Gordon* wherein a commission rate cannot become effective until the SEC has taken positive action by approving it.

Silver is supportive of the opinion of the court of appeals in this case. As is the case with the Federal Power Act, the Securities Exchange Act of 1934 contains no express exemption from the antitrust laws, and this Court held that in the absence of regulatory supervision over the application of exchange rules, an immunity from the antitrust laws could not be implied.

National Association of Securities Dealers involved Section 22(f) (15 U.S.C. 80a-22f) of the Investment Company Act, under which certain restrictive agreements in the sale of securities were authorized by Congress. When read in conjunction with the Maloney Act, (15 U.S.C. 78o-3), which provided a method of self-regulation by brokers and dealers, it was held that Congress had invested the SEC with such pervasive authority that implied immunity from the antitrust laws was necessary to make the regulatory scheme work. This holding has no relationship to the instant case. The Federal Power Act contains no provisions comparable to Section 22(f) of the Investment Company Act or the Maloney Act.

The court of appeals was correct in its approach to the issue of implied immunity when it analyzed the Federal Power Act, not the Securities and Exchange Act, in light of this Court's well-established holdings that, under the terms of the Federal Power Act and its legislative history, Congress did not immunize or relieve private power companies from the antitrust laws. Petitioner's reliance upon *Gordon* is misplaced, and flies in the fact of the statement of this Court in *Cantor v. Detroit Edison,* 428 U.S. 579 (1976): "Indeed, since our decision in *Otter Tail Power Co. v. United States,* . . . there can be no doubt about the proposition that the federal antitrust laws are applicable to electric utilities." 428 U.S. at 596, n. 35.

III.

THE PETITIONER HAS MISCONSTRUED THE *CANTOR* AND *BATES* CASES IN SEEKING IMMUNITY FROM THE FEDERAL ANTITRUST LAWS BASED ON FILINGS WITH STATE COMMISSIONS.

Petitioner argues that the court of appeals has misconstrued *Cantor v. Detroit Edison Co.,* 428 U.S. 579 (1976), in light of this Court's recent decision in *Bates v. State of Arizona,* ____ U.S. ____, 53 L.Ed. 2d 810 (1977), which barred an antitrust claim under the rule of *Parker v. Brown,* 317 U.S. 341 (1943). (Pet. 20-23) In *Parker* an antitrust suit was brought against officials of the State of California which challenged state programs designed to maintain prices in the raisin market, thereby restricting competition. It was held that the State, "as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." 317 U.S. at 352. This Court refused in *Cantor* to apply the *Parker* exception from

the antitrust laws in a situation where the defendant electric utility was furnishing light bulbs free of charge under the terms of a tariff filed with the state regulatory commission.

Cantor removed any doubts about state regulatory approvals immunizing electric utilities from the antitrust laws:

> This Court has never sustained a claim that otherwise unlawful private conduct is exempt from the antitrust laws because it was permitted or required by state law. 428 U.S. at 600.

The activity challenged in *Bates* (Rules imposed by the Arizona Supreme Court and enforcement of a disciplinary rule restricting advertising by attorneys) was distinguished from the *Cantor* situation because the "restraint is the affirmative command of the Arizona Supreme Court . . ." and is " 'compelled by direction of the State acting as a sovereign.' " 53 L.Ed. 2d at 821, citing *Parker,* 421 U.S. at 791. This Court also noted that: "We believe, however, that the context in which Cantor arose is critical. First, and most obviously, Cantor would have been an entirely different case if the claim had been directed against a public official or public agency, rather than against a private party. Here, the appellants' claims are against the State." *Id.*

The court of appeals' opinion in this case is in complete accord with this Court's treatment of *Cantor* in *Bates*:

> As in *Cantor,* the plaintiff municipalities have named no state officials or state agencies in the complaint, and there is no claim that any state action violated the antitrust laws. See 428 U.S. at 591-592. Thus under the plurality opinion, *Parker*

v. Brown does not even arguably apply to the facts of our case. Nor do Chief Justice Burger or Justice Blackmun's concurrence in *Cantor* give defendant solace. The challenged activity here is a dual rate structure. The state utility commissions have only put the imprimatur of their sanction on the retail rates charged by the defendant. The price squeeze has not been blessed by Indiana or Michigan. The fact that the district court has no authority to maintain a direct attack on the defendant's retail rates does not alter the reality that the state commissions have in no way placed a badge of approval on the defendant's dual rate structure. Consequently, defendant's conduct is not immunized under *Parker v. Brown* (Pet. App. 17a).

In *Bates*, this Court also noted that in *Cantor* "the State had no independent regulatory interest in the market for light bulbs." 53 L.Ed. at 822. The court of appeals in this case noted that: "The state commissions of Indiana and Michigan are not alleged to have any power to regulate the price squeeze in any sense. Since this conduct is not being regulated by the state commissions, Sherman Act jurisdiction of course is not ousted in favor of state regulations. The defendant does not contend otherwise." (Pet. App. 18a n. 7).

The final distinguishing point made by this Court in *Bates* was that "the light bulb program in Cantor was instigated by the utility with only the acquiescence of the state regulatory commission. The State's incorporation of the program into the tariff reflected its conclusion that the utility was authorized to employ the practice if it so desired." 53 L.Ed. at 823. In contrast, the rules restricting advertising "reflect a clear articulation of the State's policy with regard to professional behavior." *Id.* Again, the decision of the

court of appeals in this case is in accord with the holding in *Bates* and *Cantor* when it cited Judge Lord's finding in *Shakopee* that

> "if an anticompetitive practice is the product, at least in part, of the company being regulated and could be avoided if the company chose to do so, then the anticompetitive condition is in reality the work of that company and is not 'necessary' to the functioning of the regulatory scheme and will not be immunized from antitrust liability." (Pet. App. 19a)

At both the retail and wholesale levels, the initiative in setting rates comes from the utility, and is the "product" of a management decision, not the regulatory agency. It is this conduct which has created the unlawful "price squeeze" under which Illinois Municipals are suffering.

The fact that a state commission approves rates does not immunize a utility from federal antitrust law coverage, as this Court held in *Cantor*:

> *The case before us also discloses a program which is the product of a decision in which both the respondent and the Commission participated.* Respondent could not maintain the lamp exchange program without the approval of the Commission, and now may not abandon it without such approval. Nevertheless, there can be no doubt that the option to have, or not to have, *such a program is primarily respondent's, not the Commission's.* 428 U.S. at 593, 594. (Emphasis added.)

The entire procedure is started by a management determination that a rate change should be filed, after which the commission's power of review comes into

play. This procedure is typical of regulatory commissions generally.[8]

Cantor made it clear that, even under pervasive state regulation, where a lightbulb exchange program or anticompetitive rates could be challenged, the federal antitrust laws apply to electric utilities subject to such regulation:

> Unquestionably there are examples of economic regulation in which the very purpose of the government control is to avoid the consequences of unrestrainted competition. Agricultural marketing programs, such as that involved in Parker, were of that character. But all economic regulation does not necessarily suppress competition. On the contrary, public utility regulation typically assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation. There is no logical inconsistency between requiring such a firm to

[8]Professor Welch has described the procedure, and the reasons for it, as follows:

> "The normal procedure in the case of a utility seeking a rate increase is for the utility to file proposed tariffs which, in effect, spell out the changes which the utility company wishes to make."
>
> * * *
>
> "The reason why the regulatory authority works this way, through the utility company's own rate-fixing machinery, is obvious. The utility company management is better able, by experience and knowledge, to determine just how much revenue is likely to be produced by various rate changes in each class of service. In other words, the management is more familiar with the details of its own business operation than the regulatory authority, and can best judge, in the first instance, at least, what degree of changes will be needed to bring about a given result in the operating revenues." (Welch, F.X., Cases and Text on Public Utility Regulation, 515-517, Rev. Ed. (1968)).

> meet regulatory criteria insofar as it is exercising its natural monopoly powers and also to comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy. 428 U.S. at 595, 596.

And, in a footnote to the above language, Justice Stevens noted:

> Indeed, since our decision in Otter Tail Power Co. v. United States, . . . there can be no doubt about the proposition that the federal antitrust laws are applicable to electric utilities. 428 U.S. at 596, n. 35.

The Indiana and Michigan statutory provisions cited by petitioners concerning the regulation of electric utilities (Pet. 22) are typical examples of state statutes which require action on behalf of the utility before rate changes are approved.

Rate increase filings made by public utilities with the Federal Power Commission are also the result of a management decision, not as a result of FPC initiative.[9] Section 205(e) of the Federal Power Act constitutes nothing more than a statutory limitation on a utility's otherwise unqualified right to unilaterally increase rates. In discussing the provisions of the Natural Gas Act,[10] this Court in *United Gas Pipe Line Company v.*

[9]Justice Stewart, speaking for the dissent in *Otter Tail*, also noted that: "The Commission does not normally set rates, though utilities subject to its jurisdiction must file proposed rate schedules with it, and it has the opportunity of assessing the lawfulness of those rates." 410 U.S. at 390 n. 7.

[10]Filing provisions of the Natural Gas Act, 15 U.S.C. 717c(e), are virtually identical to Section 205(e) of the Federal Power Act, 16 U.S.C. 824d(e).

Memphis Light, Gas and Water Division, 358 U.S. 103, 113 (1958), stated:

> United, like the seller of an unregulated commodity, has the right in the first instance to change its rates as it will, unless it has undertaken by contract not to do so.

The U.S. Court of Appeals for the District of Columbia, in *City of Cleveland, Ohio v. FPC*, 525 F.2d 845, 855 (D.C. Cir. 1976), restated the well-established scope of the rate filing procedures under the Federal Power Act, when it said:

> The legislation effectuates a congressional scheme under which electric utilities establish initially, by contract or otherwise, the rates they will charge, subject to revision by the Commission on a finding of unlawfulness. To be sure, the utility may, without negotiation or consultation with anyone, set the rates it will charge prospective customers, and change them at will, so long as they have not been set aside by the Commission on grounds of inconsistency with the Act.

This Court in *Conway* recited with approval the language of the District of Columbia Court of Appeals, which referred to . . . "*the utility's own decision* to depress certain retail revenues in order to curb the retail competition of its wholesale customers. 167 U.S. App. D.C., at 53, 510 F.2d at 1274. (Footnote omitted.)" 426 U.S. at 279. (Emphasis added).

Thus, it is clear that price squeezes created by the conduct of regulated electric utilities are not immune from the antitrust laws under *Parker v. Brown*, as held by the court of appeals in this case.

IV.

THE REMEDIES ENACTED BY CONGRESS FOR ENFORCEMENT OF THE FEDERAL ANTITRUST LAWS IN THE PUBLIC INTEREST BY THE DISTRICT COURTS SHOULD NOT BE CIRCUMVENTED BY UNILATERAL RATE FILINGS OF UTILITIES.

Petitioner's argument to the effect that the decision by the court of appeals in this case "encourages the practice of dual proceedings, administrative and judicial, and requires the federal courts to hear and determine the same issues that are being heard and determined by FPC," (Pet. 12) is misleading and erroneous.

As this Court has consistently held, Congress did not vest FPC with pervasive authority to give complete relief from antitrust violations. It is Congress, not the court of appeals, which determines the forum in which antitrust violations engaged in by regulated electric utilities may be remedied. Wholesale customers, such as Illinois Municipals, by filing antitrust suits against price squeezes are upholding the public interest in the maintenance of competition within the electric industry. Such action is in accord with this Court's statements that: "Private treble-damage actions are an important component of the public interest in 'vigilant enforcement of the antitrust laws.' "[11] For "Congress has expressed its belief that private antitrust litigation is one of the surest methods for effective enforcement of the antitrust laws."[12]

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[11] *Olympic Refining Company* v. *Carter*, 332 F.2d 260, 264 (end Cir. 1964), quoting from *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 329 (1955).

[12] *Minnesota Mining & Manufacturing Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1955).

The number of cases involving price squeeze issues with which the district courts will have to deal is solely determined by the conduct of electric utilities who engage in pricing activity which cannot be remedied fully by the FPC. When such anticompetitive activity stops, so will the necessity to seek price squeeze remedies before both the Commission and the courts. Attempts by petitioner to halt and supersede this remedy now available to small wholesale customers should be directed to Congress, not this Court.

V.

THE COURT BELOW PROPERLY DENIED A STAY OF ANTITRUST PROCEEDINGS.

The court of appeals correctly interpreted the limitations placed upon the Federal Power Commission in providing a complete remedy for price squeeze violations, both under the filing provisions of the Federal Power Act, and this Court's unanimous decision in *Federal Power Commission v. Conway Corp., supra.* In finding that the district court did not abuse its discretion in denying a stay until the Commission acted, the court of appeals noted that ". . . the equities weigh heavily in favor of the plaintiff municipalities." (Pet. App. 28a). The reasons the equities favor the price squeeze plaintiff are found in the Act itself, as the court noted:

> The Illinois Municipals point out that the district court should be permitted to proceed in order to avoid the typical lengthy delays that occur in processing wholesale rate increases under Section 205 of the Federal Power Act (16 U.S.C. §824d). Under that provision, a public utility files its rate

> increase application no less than 30 days before the effective date thereof, and the Commission typically suspends the proposed rate from one day to five months, with refunds required if the rate is found to be above the statutory "just and reasonable" standard. The wholesale rate increase in the present case stems from a June 13, 1972, application by defendant, and the case was not terminated in the Commission until it approved a settlement on June 1, 1977, a span of five years. Except for the settlement, the case would still pend before the Commission.
>
> Thus far, the Commission has never rejected a rate filing on price squeeze or other antitrust grounds, and there is no limit on the number of filed increases that may be in effect at the same time under Section 205. Simply by filing an anti-competitive increase and waiting for time to pass, a public utility like defendant can place a price squeeze on wholesale customers. As the Commission has stated, "electric utilities are permitted to file virtually any level of costs and rates and after a period of suspension charge those rates subject to refund, pending Commission decision." FPC Order No. 487, 50 FPC at 127 (1973) (Pet. App. 28a, 29a).

This Court in *Conway* approved the remedy adopted by the court of appeals which placed a responsibility on the Commission to cure "price squeezes," which result from rate increases filed under Section 205 of the Act. The Court stated:

> When costs are fully allocated, both the retail rate and the proposed wholesale rate may fall within a zone of reasonableness, yet create a squeeze between themselves. There would, at the

> very least, be latitude in the FPC to put wholesale rates in the lower range of the zone of reasonableness, without concern that overall results would be impaired, in view of the utility's own decision to depress certain retail revenues in order to curb the retail competition of its wholesale customers. 167 U.S. App. D.C. at 53; 510 F.2d at 1274. (Footnote omitted). 426 U.S. at 279.

The *Conway* remedy, however, does not become effective until a final order has been issued by the Commission. The price squeeze period between the Commission allowing the rates to go into effect and its final order is not under the protective umbrella of *Conway*.

If the primary jurisdiction theory advocated by petitioner was adopted, wholesale customers would be subjected to harmful delays before they had an opportunity under the antitrust laws to remedy price squeeze problems created as a result of a rate filing.[13] Until the Commission finally acted, the customer would merely have to wait and suffer.

As the court of appeals below noted:

> Thus if a stay were granted to defendant, plaintiffs and customers in similar positions would be unable to secure any relief from price squeeze like this until the Commission finally approved the filed rates. As the Illinois Municipals have picturesquely put it:
>
> "Delay, combined with the multiple rate increases, could mean that the customer has

[13] Illinois Municipals are essentially captive customers of Commonwealth Edison, and have no feasible alternative source of power supply.

> been put out of business by his supplier-competitor. You cannot give refunds to a corpse." (Br. 27-28.)

> Furthermore, the Commission would be unable to afford complete relief because the Federal Power Act does not provide for damages or for an injunction against a utility violating the antitrust laws. Thus a stay in this case would excuse defendant's alleged non-compliance with the anti-trust laws for a completely unnecessary length of time (Pet. App. 29a, 30a).

Furthermore, FPC relief is not complete, as the Federal Power Act contains no provisions for an award of damages or for an injunction against an electric company engaging in violations of the antitrust laws. FPC's authority is limited to *ex post facto* review of unilateral rate increase filings. The doctrine of primary jurisdiction does not require a district court to defer to the Commission in such a situation, as noted by the court of appeals in this case:

> Nor does Conway guarantee that the price squeeze may be fully remedied by severely depressing wholesale rates to eliminate the price squeeze. This is because, as we have demonstrated above, the Federal Power Commission cannot set wholesale rates below the lower boundary of the zone of reasonableness even if the price squeeze could not be eliminated without setting the wholesale price below the zone of reasonableness limit. Primary jurisdiction is not a doctrine that requires an exercise in futility. See Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 686. Thus antitrust relief is needed for full protection from the anticompetitive conduct alleged in the complaint. (Pet. App. 25a, 26a).

CONCLUSION

The attempt by petitioner to somehow read into this Court's *Conway* decision a *sub silentio* reversal of its long line of decisions including *Otter Tail, Gulf States* and *California,* which consistently held that Congress in enacting the Federal Power Act did not intend to supersede the federal antitrust laws, was properly rejected by the court of appeals and district court below. There is no reason now to consider the matter further. The petitioner's attempt to postulate a conflict between the Commission's exercise of its jurisdiction under *Conway* and the exercise of antitrust jurisdiction by the district courts is clearly conjectural and premature. Should any such conflict arise, that would be the time to review the matter based on a specific case or controversy. In the meantime, the expeditious

exercise by both the Commission and the courts of their respective jurisdictional remedies appears warranted in furtherance of the public interest as set forth by Congress in the complementary statutory programs.

Respectfully submitted,

CHARLES F. WHEATLEY, JR.
FRANK W. FRISK, JR.
WHEATLEY & MILLER
1112 Watergate Office Building
2600 Virginia Avenue, N.W.
Washington, D.C. 20037

MARVIN G. GLINK
ANCEL, GLINK DIAMOND & MURPHY, P.C.
111 W. Washington Street
Chicago, Illinois 60602

Attorneys for Cities of Batavia, et al., Amicus Curiae

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